The Legacy of Ronald Dworkin

Edited by
WIL WALUCHOW *and* STEFAN SCIARAFFA

OXFORD

The Legacy of Ronald Dworkin

The Legacy of Ronald Dworkin

Edited by Wil Waluchow
and
Stefan Sciaraffa

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trademark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

Library of Congress Cataloging-in-Publication Data

Names: Waluchow, Wilfrid J., editor. | Sciaraffa, Stefan, editor.
Title: The legacy of Ronald Dworkin / Edited by Wil Waluchow and Stefan Sciaraffa.
Description: New York : Oxford University Press, 2016. | Includes bibliographical references and index.
Identifiers: LCCN 2015039298 | ISBN 9780190466411 ((hardback) : alk. paper)
Subjects: LCSH: Dworkin, Ronald. | Law—Philosophy. | Justice.
Classification: LCC K230.D92 L44 2016 | DDC 340/.1—dc23 LC record available at http://lccn.loc.gov/2015039298

1 3 5 7 9 8 6 4 2

Printed by Edwards Brothers Malloy, United States of America

CONTENTS

CONTRIBUTORS

Lawrence A. Alexander is the Warren Distinguished Professor at the University of San Diego School of Law, Legal Research Center.

Aditi Bagchi is a Professor of Law at Fordham University School of Law.

David O. Brink is a Distinguished Professor in the Philosophy Department of the University of California, San Diego.

Thomas Christiano is a Professor in the Department of Philosophy at the University of Arizona.

Candice Delmas is an Assistant Professor of Philosophy and Political Science at Northeastern University and the Associate Director of the Politics, Philosophy, and Economics Program.

Luís Duarte d'Almeida is Reader in Jurisprudence at the University of Edinburgh.

David Dyzenhaus is Professor of Law and Philosophy at the University of Toronto Faculty of Law.

Christopher Essert is Assistant Professor in the Faculty of Law at Queen's University in Kingston, Ontario.

Michael Giudice is Associate Professor in the Department of Philosophy at York University, Toronto, Ontario.

Daniel Halliday is a Lecturer in Political Philosophy in the School of Historical and Philosophical Studies at the University of Melbourne.

Kenneth Einar Himma is a Professor in the Department of Philosophy at Seattle Pacific University.

Joseph Raz is a Professor at Columbia Law School, and a Professor at King's College London.

Connie S. Rosati is an Associate Professor in the Department of Philosophy at the University of Arizona.

Lawrence G. Sager is the Alice Jane Drysdale Sheffield Regents Chair at The University of Texas School of Law.

Stefan Sciaraffa is an Associate Professor of Philosophy at McMaster University.

Hamish Stewart is a Professor in the Faculty of Law at the University of Toronto.

François Tanguay-Renaud is an Associate Professor at Osgoode Hall Law School and in the Graduate Faculty of the Department of Philosophy at York University in Toronto, Ontario.

Wil Waluchow is a Professor of Philosophy at McMaster University and the Senator William McMaster Chair in Constitutional Studies.

EDITOR'S INTRODUCTION

The Legacy of Ronald Dworkin (collected essays)

Wil Waluchow and Stefan Sciaraffa,[*] editors.

In June 2014, the McMaster University Program in Legal Philosophy sponsored a conference titled *The Legacy of Ronald Dworkin* (lawconf.mcmaster.ca). The conference featured ten keynote addresses and thirty-one conference presentations culled from a pool of about eighty submissions. These presentations touched upon many aspects of Ronald Dworkin's wide-ranging contributions to philosophy, including his theory of value, political philosophy, philosophy of international law, and legal philosophy. The present volume comprises sixteen of these papers (eight keynotes and eight conference presentations).

The volume's organizing principle and theme reflects Dworkin's self-conception as a builder of a unified theory of value. The broad outlines of Dworkin's system can be found in a number of passages from his work, including the following:

> We all have unstudied moral convictions, almost from the beginning of our lives. These are mainly carried in concepts whose origin and development are issues for anthropologists and intellectual historians. We inherit these concepts from parents and culture and, possibly, to some degree through genetic species disposition. As young children we deploy mainly the idea of fairness, and then we acquire and deploy other, more sophisticated and pointed moral concepts: generosity, kindness, promise keeping, courage, rights, and duties. Sometime later we add political concepts to our moral repertoire: we speak of law, liberty, and democratic ideals. We need much more detailed moral opinions when we actually confront a wide variety of moral challenges in family, social, commercial, and political life. We form these through interpretation of our abstract concepts that is mainly unreflective. We unreflectively interpret each in the light of the others. That is, interpretation knits values together.[1]

We catch a glimpse of Dworkin's hedgehog in the passage's last two sentences. There, Dworkin asserts that in response to practical challenges, we refine our

[*] We would like to thank the Social Sciences and Humanities Research Council of Canada, McMaster University, and Osgoode Hall Law School for their generous support of the 2014 McMaster Legal Philosophy Conference: *The Legacy of Ronald Dworkin* (lawconf.mcmaster.ca).

[1] Dworkin (2011: 101).

initial unstudied moral and political concepts by knitting them together with other value-concepts. That is, we interpret the requirements of each discrete value-concept so that they fit with and support the requirements of our other value-concepts, including not only the sundry moral and political concepts alluded to above, but also value-concepts from other practical domains. For Dworkin, doing moral, political, or legal philosophy is in large part to engage in this value-concept integrating activity, but in a reflective way.

The volume's first section, Part I, "The Unity of Value," addresses the most abstract and general aspect of Dworkin's work—the unity of value thesis that Dworkin broaches in the passage above. Our hope is that by addressing this material in the volume's first section, we will encourage the reader to keep in mind that Dworkin's corpus is informed and integrated by the unity of value thesis. Joseph Raz's contribution is the lone entry in this first section. Despite his status as a leading proponent of exclusive legal positivism and an incisive critic of Dworkin's non-positivist legal theory, Raz offers a highly sympathetic and nuanced exploration of Dworkin's unity of value thesis. As we hope Raz's contribution and our discussion below of his and the other contributions to the volume illustrate, Dworkin's practical philosophy rests on a web of interconnected and mutually supportive theories of truth, the nature of value, the semantics of value-claims, and how such claims can be justified.

The volume's second section, Part II, "Political Values: Legitimacy, Authority, and Collective Responsibility," addresses Dworkin's contributions to political philosophy. Dworkin holds that political concepts, such as the concepts of law, liberty, and democratic governance enumerated in the passage above, comprise a distinct subset of moral concepts. Namely, political concepts are those moral concepts that pertain to the values realized by collective entities, such as states and other associations to which we belong, rather than our individual actions or characters.[2] The contributions to the volume's second section address Dworkin's discussions of a number of such political concepts, including authority, civil disobedience, the legitimacy of states and the international legal system, distributive justice, collective responsibility, and Dworkin's master value of dignity and the associated values of equal concern and respect.

The volume's third section, Part III, "General Jurisprudence: Contesting the Unity of Law and Value," addresses various aspects of Dworkin's general theory of law. As we shall see, Dworkin held that law is a kind of value, located in its distinct place in the web of interdependent and interdefined values described in his unity of value thesis. As Dworkin puts it in his later writings, he defends a one-system view of law, according to which law is not a normative system distinct from other values, particularly moral, but rather law is part of one larger system of value. This section comprises responses to this one-system view—some sympathetic and others highly critical.

The volume's fourth and final section, Part IV, "Value in Law," comprises pieces that offer accounts of the structure and defining values of discrete areas of law.

---

[2] Id. 327-329.

To put it in widely used terms that (as we discuss below) Dworkin might resist, these pieces are contributions to normative jurisprudence rather than general jurisprudence—more specifically, the normative jurisprudence of constitutional law, the law of contract, and procedural law. Given the systematic and unitary nature of Dworkin's theory of value, it should not be surprising that the border between Dworkin's political philosophy and his normative jurisprudence is porous. For example, Daniel Halliday's contribution challenges the justice of a legal regime that would allow unlimited intergenerational transfer of wealth via bequests. Hence, it both addresses the law of wills and estates and Dworkin's theory of distributive justice, yet we have placed it in the volume's political philosophy section. Similarly, Aditi Bagchi's piece defends a theory of contractual interpretation based on Dworkin's account of authority, and Hamish Stewart criticizes and offers an alternative to Dworkin's claim that fairness and accuracy in fact finding are the key defining underlying values of procedural law. Yet, we have placed these pieces in the volume's final section that addresses Dworkin's normative jurisprudence.

No doubt, good arguments could be made that some of the pieces placed in the volume's final section (e.g., Stewart's and Bagchi's) could have been place in its second section, and vice versa (e.g., Halliday's). Our guiding principle in this regard is that the volume's final section should comprise contributions that focus on the fundamental structure and values of discrete bodies of law. Thus, for example, we grouped Halliday's piece with the contributions pertaining to Dworkin's political philosophy rather than the volume's final section on the grounds that although his piece has implications for the justice of tax policy and laws governing intergenerational transfer, its primary objective is not to explicate the fundamental structure or underlying defining values of a discrete body of law.

There are many arguments and insights contained with this volume that we do not discuss in this introduction despite their cogency and importance. In part, this is due to space constraints. Also, this material ably speaks for itself, and, hence, there is no need to rehearse it all here. Rather, our main objective in what follows is to illustrate the systematic nature of Dworkin's practical philosophy by identifying key Dworkinian threads that run through and unify the various arguments that our contributors have advanced. To this end, we sketch only some of the main arguments from the works collected here, with an eye to situating them both with respect to Dworkin's arguments that are directly relevant and his systematic theory of value. Paralleling the structure of our volume, the following discussion comprises four sections that respectively speak to the volume's four parts and their associated themes: the unity of value; political values; value in general jurisprudence; and value in law.

1. The Unity of Value

As noted above, Raz's contributes the lone entry in our volume's first section. In this piece, Raz seeks to clarify Dworkin's unity of value thesis, and he identifies a

research agenda comprising questions that Dworkin has left for us. To this end, Raz sets out a general statement of the unity of value thesis and then explores two interpretations of it. As a preface to his statement of the unity of value thesis, Raz notes that Dworkin's term *value* refers to a broad normative category that includes reasons, norms, virtues, and values in the narrower, more common sense of the term. Raz also cites the following two passages from Dworkin:

> [T]he various concepts and departments of value are interconnected and mutually supportive.[3]

> The truth of any true moral judgment consists in the truth of an indefinite number of other moral judgments and its truth provides part of what constitutes the truth of any of those others.[4]

Although the latter statement refers specifically to moral judgments, Raz takes it to be a particular application and elaboration of the relationship between the departments and categories of values described in the first passage cited immediately above.

Raz formulates Dworkin's unity of value thesis as follows:

> Given what values are, each of them and each value proposition or value belief rests on a constitutive case, and the values included in these cases themselves rest on further constitutive cases.(9)[5]

In sum, as Raz reconstructs it, Dworkin's unity of value thesis holds that the truth-conditions of any value claim refer to other true value statements. That is, for any value-claim, it is true only if and because its truth is supported by other true value-claims.

A large part of Raz's discussion is an exploration of the connection that Dworkin draws between the unity of value thesis and his idea of constructive interpretation. As is well known, Dworkin holds that constructive interpretation comprises three elements:

> Interpretation can therefore be understood, analytically, to involve three stages. We interpret social practices, first, when we individuate those practices: when we take ourselves to be engaged in legal rather than literary interpretation. We interpret, second, when we attribute some package of purposes to the genre or subgenre we identify as pertinent, and, third, when

---

[3] Id. 10.

[4] Id. 117.

[5] Compare Raz's statement of Dworkin's unity of value thesis with his claim that practical reasons are facts that constitute the case that the actions for which they are reasons are valuable. Bear in mind that, as Raz notes, Dworkin would characterize assertions of the form "A has a reason to phi" as value-claims. See, e.g., Raz (2011: 13): "A normative practical reason is a fact that actions of a certain kind have properties that can give a point or a purpose to their performance, properties that make it possible for people to perform those actions because they posses them, and where actions so undertaken are intelligible because of that fact." See also Id. 36: "Reasons for action, I will assume, are facts that constitute a case for (or against) the performance of the action."

> we try to identify the best realization of that package of purposes on some particular occasion.[6]

The unity of value thesis figures in the second and third stages of constructive interpretation. In the second stage, the interpreter must look to values external to the practice in question to locate the practice's purposes or, as Dworkin sometimes puts the same idea, the practice's values. And, in the third, the interpreter must look to these underlying purposes or values to determine what the practice requires in particular cases. For instance, on this view, to specify the underlying values and requirements of the practice of acting with courtesy, one must look to values other than courtesy (e.g., respect).[7] In sum, for Dworkin, any value-claim is justified in terms of a network of all other value-claims, each component claim of which is justified in the same way. Hence, no set of values plays a foundational justificatory role.

A key question Raz raises is whether the most plausible reconstruction of Dworkin's unity of value thesis assigns a merely epistemic role to constructive interpretation or an epistemic and innovative role. Raz labels the merely epistemic reading as the Object-Dependence Thesis (ODT), which he formulates as follows:

> Truths about value are independent of any single person's view about what values there are; the constitutive case for them consists of values or propositions about values.(16)

On this view, truths about value are mind-independent in the following robust sense: Dworkinian interpretive reasoning with respect to the relevant initial set of unruly and inconsistent beliefs about value (perhaps an agent's beliefs or beliefs widely accepted within her community) provides practical agents with epistemic access to truths about such values, but such reasoning, even if fully informed and idealized, is not constitutive of those truths.

By contrast, according to a perspectival constructivist reading of the unity of value thesis, interpretive reasoning is both epistemic and innovative, for true value statements just are those that reflect the value judgments that would result from the application of Dworkinian interpretive reasoning to the initially unruly set of value propositions comprised by the relevant perspective. Hence, on the constructivist reading of the unity of value thesis, truths about value are objective and mind-independent in a weak sense of the term, for any single person might make mistakes in her interpretive reasoning about values or might so reason on the basis of mistaken empirical facts. However, such truths would not be mind-independent in the more robust sense of the term that, as we read it, the ODT contemplates, for on the constructivist account, truths about value are constituted by

---

[6] Dworkin (1986: 230-231).

[7] See Id. 46-49.

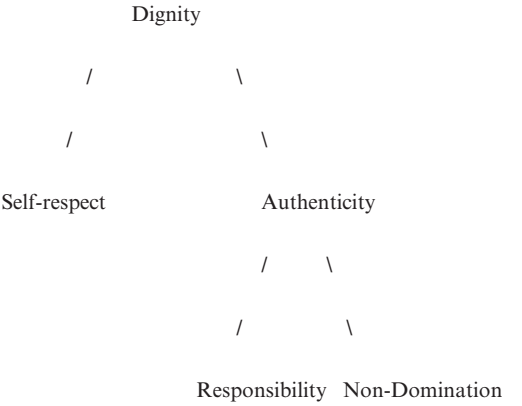

FIGURE 1.1. *Dworkin's Complex Conception of Dignity.*

the deliverances of the method of interpretive reasoning correctly applied to the relevant perspective's set of value judgments.

Note further that, as we understand it, the perspectival constructivist reading is not a response-dependence view. That is, this reading does not hold that a value claim is true if and only if a fully informed and ideal interpretive reasoner would accept it. Rather, the claim is that true-value claims are those that are entailed by the method of interpretive reasoning as applied to the relevant set of initially unruly set of value judgments and the correct empirical facts.

Raz finds evidence for the constructivist reading in Dworkin's discussions of the values of authenticity and responsibility. For Dworkin, the value-concepts of authenticity and responsibility are constituents of a larger complex of value-concepts that Dworkin refers to as dignity, as shown in Figure 1.1.

According to Dworkin, self-respect requires each person to acknowledge that her life matters, and hence the importance of living an authentic life.[8] Dworkin adds that living an authentic life entails acting responsibly, which among other things, involves acting in accordance with the deliverances of interpretive reasoning as applied to one's initially wild and unruly array of value beliefs (as described by Dworkin in the lengthy passage cited in the second paragraph of this introduction).[9]

Raz suspects that Dworkin would accept neither the ODT nor the constructivist interpretation[10] of the unity of value thesis. Nonetheless, he considers these

---

[8] Dworkin (2011: 203-204).

[9] See also Id. 108 & 203-204.

[10] Scattered throughout Dworkin's corpus are a number of discussion that speak to whether he is most charitably read as a kind of metaethical constructivist or could be sympathetically reworked along these lines. See Dworkin (1973: 505-519) for a distinction between two interpretations of Rawls's method of reflective equilibrium: constructive and natural. The latter parallels Raz's Object-Dependence Theory (ODT), and the former parallels the perspectival constructivist

two possibilities in the hopes of clarifying Dworkin's view and the research program that it frames. Raz describes this research programme as follows:

> Given that truths about values are grounded in constitutive cases themselves consisting (in part) of truths about values, each one of which depends on a constitutive case, and so on and so forth, we should research (a) whether, and if so to what degree or in what ways, do the links thus existing between truths about values connect all truths about all values, or only some of them; and (b) how tight are the connections between values so established (do they allow for conflict? Indeterminacies? Etc.)?(22)

Raz recognizes that Dworkin's answers to some of these questions are clear. Namely, Dworkin holds that all values are linked to one another, that there are no incommensurate values, and that there are no fundamental conflicts between values. However, Raz argues that these answers are not required by the unity of value thesis and that Dworkin has provided no argument for them.

Toward the end of his contribution, Raz argues that whether Dworkin realized it or not, the ODT must be the "ultimate foundation of the doctrine of unity."(21) The following passage contains Raz's main argument for this claim.

> [A]t the end of the day Dworkin sees the case for engaging in interpretive reasoning, as he understands that process, that is the case for understanding values through Dworkinian interpretation, as resting on the responsibility project. It is what responsibility requires of us. The case for the responsibility project is that it is valuable, and its value must in the last resort be vindicated by the ODT approach.(21)

One might object that the responsibility project need not in the last resort be vindicated by the ODT approach, for this project could be vindicated by way of a perspectival constructivist approach. That is, at least from some perspectives, engaging in interpretive reasoning with respect to the unruly and wild array of value judgments that constitute those perspectives would lead to endorsement of the responsibility project. In other words, for some, interpretive reasoning might very well be self-affirming.

However, this objection misses Raz's point, which we take to be the following twofold claim. First, the responsibility project is valuable only if the unity of value thesis is true. In other words, engaging in interpretive reasoning with respect to one's value judgments is a valuable project only if, per the unity of value thesis, such reasoning leads to true beliefs about value. Second, if Dworkin's metanormative unity of value thesis is true, its truth is, per the ODT, "independent of any

---

reading of the unity of value thesis. Dworkin endorses the constructive interpretation of reflective equilibrium. See too Dworkin (2011: 63-66). There, he rejects Rawls's constructivism. Note, however, that what he specifically rejects is Rawls's attempt to employ this method in his latter work without relying on moral truths or aspiring to identify such truths. Most vexing for the constructivist reading of Dworkin is his puzzling skirmish with Sharon Street, who is a thoroughgoing constructivist about value. See Dworkin (2011: 446, n. 9). See also Dworkin (1996).

single person's view about what values there are."(16) In sum, we take Raz's claim to be that for the responsibility project to be vindicated, at least one truth about value—namely, the metanormative unity of value thesis itself—must not be a perspectival construction.

Dworkin's sketchy remarks about the concept of truth suggest how one might defend an unalloyed constructivist reading of Dworkin's unity of value thesis:

> We could offer, as our most abstract characterization, that truth is what counts as the uniquely successful solution to a challenge of inquiry. We could then construct more concrete specifications of truth for different domains by finding more concrete accounts of success tailored to each domain. These different accounts would be nested. The value theory would be a candidate account for success across the whole domain of interpretation, and the theory of moral responsibility I described in chapter 6 would be a candidate application of the value theory to the more specific interpretive domain of morality. A different account of success, and hence, truth, would be offered for science.[11]

In keeping with this passage, the Dworkinian constructivist might point out that her theory of value—the unity of value thesis—is itself a candidate account of the success conditions of value judgments. Moreover, she could argue that whether the unity of value thesis is itself correct turns on the set of success conditions that govern such metanormative claims. As we interpret it, Raz's point about the foundational status of the ODT presupposes the robust mind-independence of metaethical truths. However, it is unlikely that Dworkin would have accepted this presupposition.[12]

As the following passage indicates, Dworkin argues that truth is itself an interpretive concept and hence, claims about truth, i.e., claims about the success conditions of claims within any discourse, must be established by way of interpretive reasoning.

> We can rescue philosophical arguments about the nature of truth if we can understand truth as an interpretive concept. We should reformulate the different theories of truth that philosophers have proposed, so far as we can, by treating them as interpretive claims. We share a vast variety of practices in which the pursuit and achievement of truth are treated as values. We do not invariably count it good to speak or even to know the truth, but it is our standard assumption that both are good. The value of truth is interwoven in these practices with a variety of other values that Bernard Williams called, comprehensively, the values of truthfulness.[13]

---

[11] Id. 177.

[12] Dworkin is difficult to parse on this particular issue. See Id. 446, n. 9 and Dworkin (1996) for relevant discussions.

[13] Dworkin (2011: 173).

Thus, in accordance with the tenets of constructive interpretation, Dworkin could argue that to specify the purposes and hence the truth-conditions of any type of discourse, be it scientific or value-discourse, the theorist must engage in first-order argument about the underlying values of engaging in discourse of that kind.[14] That is, one must engage in interpretive reasoning. Accordingly, one committed to a thoroughgoing perspectival constructivist reading of the unity of value thesis might argue that the success conditions of metanormative claims about the success conditions about value (e.g., the unity of value thesis) are not robustly mind-independent. Rather, they too are perspectival constructions of interpretive reasoning.

At this point, it should be clear that Dworkin made many claims and arguments that fall squarely within the domain of inquiry commonly described as metaethics. As we have just discussed, Dworkin defended a theory of the underlying nature of value, the meaning and structure of value concepts and claims, the truth-conditions of value-claims, and how such value-claims might be justified. Moreover, as we hope this volume illustrates, Dworkin's core metaethical claim, the unity of value thesis, is the backbone of all his work.

Readers familiar with Dworkin's work might object to our characterization of the unity of value thesis as a metaethical claim, for Dworkin vigorously expressed his impatience with the distinction between first-order ethics and metaethics. To wit, a section of *Justice for Hedgehogs* bears the title, "Yes, Meta-Ethics Rests on a Mistake."[15] Although we cannot fully unravel this knot here, we think that the discussion of Dworkin's theory of truth puts us in a position to identify a key thread. Namely, Dworkin was not opposed to metaethics broadly construed as inquiry into the semantics, epistemology, and underlying metaphysics of normative discourse. However, he did reject a distinction that he took to be a defining tenet of contemporary metaethics: "the distinction most moral philosophers draw between ordinary ethical or moral questions, which they call first- order substantive questions, and the second- order questions they call 'meta- ethical."[16]

As we have just seen, Dworkin rejected this distinction, for he held that truth is itself an interpretive value-concept, and hence, the metaethical project of establishing the success conditions (or the lack thereof) of value claims can proceed only by way of first-order arguments about values. Note further that this view reverberates throughout his work. For instance, as is well known, he similarly holds that no firm line divides general jurisprudence from judging. That is, in his view, there is no firm line that divides establishing the success conditions of first-order legal reasoning (general jurisprudence) from first-order legal reasoning (judging).

---

[14] See Huw Price (2013) and Lynch (2009) for carefully defended and stated theories of truth that in some respects parallel the theory of truth that Dworkin sketches in *Justice for Hedgehogs.*

[15] Dworkin (2011: 67).

[16] Id.

2. Political Values: Legitimacy, Authority, and Collective Responsibility

The volume's second section comprises pieces that address some of Dworkin's key contributions to political philosophy. In their respective pieces, Candice Delmas and Thomas Christiano critically assess a number of Dworkin's claims about the basis and scope of political legitimacy. Delmas and Christiano advance their argument within the framework of Dworkin's account of political legitimacy that holds (1) a state is legitimate only insofar as it possesses the moral liberty to enforce its directives, and (2) such legitimacy is likely fatally undermined if the state does not have the moral power to obligate its subjects by issuing those directives.[17]

Dworkin frames his inquiry into the grounds of political legitimacy in terms of a tension between two kinds of value. On the one hand, he recognizes that a necessary condition for the realization of goods of the very highest moral importance is widespread conformity to and enforcement of networks of putative obligations. For example, the goods of friendship, marriage, and a parent-child relationship can only be realized if the norms that constitute these relationships are followed and enforced. In this same vein, the goods of living in a political community (stability, order, reliable rights protection, and so on) can only be realized if the relevant network of putative obligations that constitute the political community is followed and enforced. Thus, for Dworkin, a key basis of the political obligation to obey a community's laws and the state's moral liberty to enforce those laws is that following and enforcing these norms contributes to the maintenance of the goods of political community.

On the other hand, Dworkin worries that the conformity to and enforcement of such political obligations is a threat to the value of dignity. As Dworkin characterizes this value, dignity requires the moral agent both to stay true to her reasons in the face of irrational contrary impulses and to act in accordance with her own interpretive reasoning rather than the dictates of others. Thus, his worry:

> How can I, given my special responsibility for my own life, accept the dominion of others? How can I, given my respect for the objective importance other people's lives, join in forcing them to do as I wish?[18]

In short, Dworkin's concern is that by conforming to the dictates of others as embodied in the state's laws, the moral agent might fail to manifest appropriate recognition of the fact that her life matters. Similarly, by enforcing those laws, moral agents might fail to respect the importance of other people's lives.

Dworkin holds that this tension can be resolved on the basis of a Kantian principle implicit in the second question of the immediately foregoing passage. This principle holds that self-respect (a component of Dworkin's master value of

---

[17] Dworkin (2011: 321-323) and (1986: 190-192).

[18] Dworkin (2011: 320).

dignity) requires recognition of the objective rather than the subjective ground of the fact that one's life matters—namely, a ground shared by all rational agents. Hence, self-respect requires acknowledgment of the fact that one's life matters as much but not more than the life of other rational agents.[19] Accordingly, he offers the following resolution of the stated worry:

> We find ourselves in associations we need and cannot avoid but whose vulnerabilities are consistent with our self-respect only if they are reciprocal—only if they include the responsibility of each, at least in principle, to accept collective decisions as obligations.[20]

Thus, Dworkin concludes that the conformity to and enforcement of a community's laws is not an affront to one's dignity so long as all members of the community conform and are held to the community's constitutive obligations. To this condition of political legitimacy, Dworkin adds one more. Namely, norms generally accepted as obligations are "genuine obligations . . . only when they are consistent with an equal appreciation of the importance of all human lives and only when they do not license the kind of harm to others that is forbidden by that assumption."[21]

In sum, in at least two ways, Dworkin's value of dignity plays a crucial role in grounding political legitimacy. First, by conforming to and holding others to the laws of one's community, the moral agent plays her part in a group practice that is a necessary condition for the realization of goods that are integral to the well-being of every member of her political community. In other words, by acting in this way, the moral agent acknowledges that her life and those of her fellow community members matter, thereby according an appropriate measure of respect to each. Second, violating those norms is an affront to the dignity of those who accept and conform to such obligations, for such violations are failures of reciprocity that render others' unrequited conformity to the practice a tacit denial of their equal worth.

In a crucial qualification of the second condition just described, Dworkin allows that political obligations are binding even if they embody an imperfect conception of equal appreciation so long as their deficiencies are not too egregious.[22] However, this qualification introduces yet a further tension. On the one hand, respect for human dignity requires conformity to the extant laws of the community despite their imperfections, yet on the other, it might be that by disobeying those laws one might contribute to efforts that might lead the community to a more perfect appreciation of the equal worth of its citizens. Thus, Dworkin acknowledges that "[i]t is debatable when civil disobedience is an appropriate response to a citizen's more general obligation to help improve his community's

---

[19] See Id. ch. 11.
[20] Id. 320.
[21] Id. 315.
[22] See e.g., Dworkin (1986: 202-206).

sense of what its members' dignity requires."[23] In her contribution, Delmas enters into this debate, and she argues that in addition to the political obligation of obedience to the law, there is a political obligation of civil disobedience. That is, she argues that "resistance to unjust laws, policies, and institutions in overall legitimate communities, as well as resistance to illegitimate governments and are not only compatible with, but required by, the principles of Dworkinian dignity."(26) More pointedly, she argues that contemporary political communities are egregiously unjust, and hence, the predominant duty binding on the members of such communities requires disobedience.

Whereas Delmas responds to Dworkin's account of the basis of state legitimacy, Christiano critically assesses and offers an alternative to his account of the basis of the legitimacy of international law. That is, he assesses and provides an alternative account of the complex of legal norms, such as *jus cogens* norms, the provisions of certain multilateral treaties, and international customs that are commonly recognized as constituting an international legal order with which all states are duty-bound to comply. Christiano criticizes two features of Dworkin's account of the basis of this body of law's legitimacy: its non-cosmopolitanism and its failure to recognize the import of state consent.

As noted above, Dworkin holds that the ability to secure a number of highly important goods is a key basis of a state's political legitimacy. Dworkin enumerates a number of goods that states secure in support of his views concerning the basis of the legitimacy of international law: protection from the depradations of war and human rights abuses; the avoidance of catastrophic collective action failures that can only be cured by international coordination (e.g., climate change or depletion of the oceanic commons); the provision of some say in the enactment and administration of international policies that have significant implications for the well-being of their citizens; and the ability of a state's citizens to acquit their responsibilities to help protect people in other nations from war crimes, genocide, and other violations of human rights.[24] Dworkin argues that international law is constituted by a set of norms practiced by states. More pointedly, they are those norms that constitute an international practice that augments states' capacity to provide their respective citizenries with goods of the sort just enumerated. Dworkin further argues that such norms impose binding obligations for any state insofar as conformity with them augments that state's ability to provide its citizens with those goods.

In sum, Dworkin's account of the legitimacy of international law is non-cosmopolitan, for on this account, international law is binding and hence legitimate only insofar as each respective state's conformity to this body of law mitigates that state's legitimacy deficits with respect to its own citizens. Christiano challenges the non-cosmopolitan structure of Dworkin's account, arguing that the fundamental interests of all persons are the immediate ground of the legitimacy

[23] Id. 321.

[24] Dworkin (2013: 17-18).

of international law. His argument is twofold. First, the international community must pursue certain aims, including (1) the realization of international peace and security; (2) protection against human rights abuses; (3) the avoidance of environmental disaster; (4) a decent system of international trade and migration; and (5) the alleviation of severe global poverty. The pursuit of these objectives is required because, as Christiano puts it, "pursuit of anything less would suggest that the fundamental interests of some persons did not matter."(65) Second, a key ground of the legitimacy of the international legal order is that, presently, the best way for states to contribute to the realization of the morally mandatory aims just described entails conforming to and enforcing the network of norms that constitute that order (e.g.,*jus cogens*, the doctrine of state consent).

The second main criticism that Christiano marshals against Dworkin's account of the legitimacy of international law pertains to the doctrine of state consent. Christiano argues that by dint of the right of states to say *no,* as set out in this doctrine of state consent, states and, more important, their citizens, enjoy a measure of control over the shape of the international law that sets and implements the international community's objectives (e.g., the five aims enumerated above). Moreover, this doctrine provides citizens with such a say without threatening the integrity of state-level political societies in the way that transnational or global majoritarian voting would. Furthermore, Christiano argues that all persons have a fundamental interest in exercising such control. Thus, allowing for some qualifications, Christiano concludes that a key ground of the doctrine of state consent is the importance of giving all persons control over how the international legal system implements the five fundamental aims listed above. More pointedly, Christiano criticizes Dworkin's account for its failure to recognize that consent is a key ground of the legitimacy of the international order, and he attributes this failing in part to the non-cosmopolitan structure of Dworkin's view. As a notable aside, Christiano and a number of other theorists of democracy marshal similar criticisms of the dismissive account of the intrinsic value of the democratic procedural form that informs Dworkin's defense of the institution of judicial review.[25]

Francois Tanguay-Renaud considers yet another aspect of Dworkin's complex value of dignity, the requirement to hold oneself to account for one's wrongdoing. Dworkin characterizes this requirement as a second aspect of the responsibility project, the first being the requirement (described above) to act in accordance with one's understanding of value.

To see the particular Dworkinian claim that interests Tanguay-Renaud, it helps to consider first a parallel claim that Dworkin advances in the course of his characterization of the first aspect of the responsibility project.

As Dworkin puts this claim:

> Political integrity assumes a particularly deep personification of the community or state. It supposes that the community as a whole can be

[25] See, e.g., Christiano (2008) and Waldron (2006).

> committed to principles of fairness or justice or procedural due process in some way analogous to the way particular people can be committed to convictions or ideals or projects, and this will strike many people as bad metaphysics.[26]

More generally, Dworkin argues that the members of any number of important forms of community, not just political communities, must personify the relevant community as a necessary prelude to reasoning about their obligations as members of that community—i.e., their associative obligations. That is, any such community member must presuppose that the relevant community as a whole is committed to some fundamental valuable set of points or purposes. This is because the content of her obligations as a member of that community are fixed by the community's mutually recognized and practiced network of obligations, interpreted through the lens of the defining values attributed to the community as a whole rather than any particular member of the community.

Similarly, Dworkin argues that ascertaining responsibility for individual wrongdoing, the second aspect of the responsibility project, requires personifying a collective and identifying a wrong the collective has committed, for in those contexts doing so is a necessary first step in reasoning correctly about individual responsibility.[27] For example, Dworkin would argue that the full range of moral responsibility borne by the individual shareholders or executives of a corporation can only be ascertained by first personifying the corporation and identifying a wrongdoing it has committed (e.g., endangering the public by negligently putting a defective product on the market).

Tanguay-Renaud marshals two main challenges to Dworkin's thesis about collective wrongdoing. First, he questions the coherence of Dworkin's account of collective agents that can bear responsibility for moral wrongdoing in their own right. Second, he cautions against overlooking conceptual resources for characterizing individual responsibility that would obviate the alleged need to identify a collective agent's wrongdoing in order to ascertain the entire range of individuals' wrongdoing.

In the final contribution to the volume's second section, Daniel Halliday critically assesses Dworkin's application of his theory of distributive justice to laws governing inheritance and bequests. Halliday accepts Dworkin's conclusion—namely, that such inheritances should be allowed, but they must be taxed, perhaps, heavily. However, Halliday holds that Dworkin's arguments for this conclusion are not supported by the deeper principles of his theory. As is well-known, Dworkin holds that the values of equal concern and respect imply that the distribution of resources within a society should be ambition-sensitive or, in other words, choice-sensitive yet endowment-insensitive. That is, the distribution of resources within a just society must be sensitive to the social value of one's

---

[26] Dworkin (2011: 167).

[27] See, e.g., Dworkin (1986: 171).

choices of what to do with one's life (e.g., to be an entrepreneur or a person of leisure), but it should only be sensitive to differences in endowments (e.g., intelligence, handicaps, certain kinds of luck) to the extent necessary to preserve the choice sensitivity of redistribution or other important values.

To frame inquiry into the rough contours of polices that would be both choice-sensitive and appropriately endowment-insensitive, Dworkin offers the following famed thought experiment:

> What level of insurance against low income and bad luck would people in our own actual community buy if the community's actual wealth was equally divided among them, if no information was available that would lead anyone or any insurer to judge that he was more or less at risk than others, and if everyone otherwise had state-of-the-art information about the incidence of different kinds of bad luck and the availability, cost, and value of medical or other remedies for the consequences of that bad luck?[28]

Dworkin's hope is that this hypothetical market device supplies a rough and workable frame for reasoning about the levels of taxation and social insurance a just society must implement to mitigate the risk of faring poorly in the endowment lottery.

A point crucial to Halliday's criticisms is that the hypothetical insurance market device is tailored to a very specific set of circumstances—namely, those in which remedying the relevant endowment-sensitive distribution would vitiate the choice-sensitivity of the distribution or some other profoundly important value. For example, Dworkin argues that should any community redress inequalities resulting from severe handicaps up till the point that further expenditures would not bring those so afflicted marginally closer to a position of equality, the bulk of its members "would have nothing left to spend on anything else, and the lives of all other citizens would be miserable in consequence."[29] In a similar vein, he argues that to remedy fully the differentials that result from differences in talent, a community would have to restore "people to a condition of equal wealth, no matter what choices they make about work and consumption."[30] Nonetheless, Dworkin holds that these inequalities should be redressed to some extent, and Dworkin argues that his hypothetical insurance market device is a useful frame for reasoning about the extent to which a just society must redress them.

As Halliday notes, Dworkin marshals his hypothetical insurance market device in support of the conclusion that, as a matter of justice, bequests and inheritances must be taxed, perhaps heavily. Although Halliday reaches a similar conclusion, he argues that the hypothetical insurance market frame is inapposite to this context of inquiry. As we have just seen, Dworkin's hypothetical insurance market device is tailored for contexts in which reasons of great moral

---

[28] Id. 360.
[29] Id. 359.
[30] Id.

weight militate against mitigating endowment-based inequalities beyond a certain point. Halliday argues that it is far from clear that there are reasons of comparable importance relevant to the context of inheritances and bequests. To wit, the only reason Dworkin cites against fully mitigating in this context is that doing so would significantly interfere with the freedom to make interpersonal transfers.

Halliday also disputes Dworkin's characterization of the key worry about an unfettered regime of inheritances and bequests. That is, Halliday argues that, contra Dworkin, the key risk is not that such a regime is likely to produce some endowment-sensitive distributive inequalities. Rather, it is the much graver possibility that such a regime would create and entrench class hierarchies and a whole host of attendant social pathologies, such as failures of social solidarity and mutual understanding as well as the upper class's imposition and maintenance of yet further unjustified distributive inequalities. In sum, Halliday argues that there are powerful reasons to forestall entirely the emergence of such class hierarchies, and, by contrast, very little reason not to heavily regulate inheritances and transfers.

GENERAL JURISPRUDENCE: CONTESTING THE UNITY OF LAW AND VALUE

The volume's third section comprises contributions that respond to Dworkin's theory of law. Dworkin reports that his earliest incursions into legal theory presuppose that law and morality are two distinct normative systems (i.e., the two-system view), for he held that "the law includes not just enacted rules, or rules with pedigree, but justifying principles as well."[31] He also reports that he no longer accepts the two-system view, but rather subscribes to a one-system view according to which the law is a particular branch of political morality.

> Legal rights are political rights, but a special branch because they are properly enforceable on demand through adjudicative and coercive institutions without need for further legislation or other lawmaking activity.[32]

Put in terms of the unity of value thesis (cited above), Dworkin holds that the truth of any proposition of law, i.e., a proposition about legal rights and duties, turns on the truth of an indefinite number of other true value-propositions, particularly those relevant to the question of whether it would be proper for a court to secure the enforcement of the putative law.

In his contribution, Larry Sager accepts Dworkin's one-system view, for he agrees that the law is but a particular branch of political morality. However, he rejects Dworkin's formulation of this one-system view according to which the law comprises only those norms that are judicially enforceable, for Sager argues

---

[31] Id. 402.
[32] Id. 407.

that some norms are law in the sense that they are binding on nonjudicial legal officials, yet it would not be proper for a court to enforce them.

Sager offers the Thirteenth Amendment to the Constitution of the United States (U.S. Constitution or the Constitution) as one of a number of examples that supports his criticism of Dworkin's one-system view. As Sager notes, the United State Supreme Court has recognized that the U.S. Congress has "authority to outlaw private racial discrimination in property transactions, since the abolition of slavery in the Amendment entailed not merely the dissolution of servitude itself but the eradication as well of the badges and incidents of slavery", but "the Court has confined its own enforcement of the 13th Amendment to instances of actual servitude . . . ."(125)

Sager's point, then, is that Dworkin's particular conception of the one-system view problematically implies that if the Court is correct in its view that it must confine its direct enforcement of the Thirteenth amendment to instances of actual servitude, then victims of private racial discrimination would enjoy no more than a "legislative right" requiring the U.S. Congress to outlaw discrimination of this sort. In other words, Dworkin's view would imply that such victims have no "legal right," for according to the Dworkinian variation on the one-system view, if such victims had a legal right, then it would be proper for the court to enforce that right directly. Sager argues that the more plausible view is that the Thirteenth Amendment supplies a legal right not to suffer private racial discrimination that is not judicially enforceable.

Dworkin registers awareness of Sager's counterexample and concomitant claim that some legal rights are not judicially enforceable. Moreover, Dworkin comments that Sager's alternative view "might be tempting if we could sensibly adopt the two-systems view and a positivist theory of how we should decide what the law is."[33] In large part, Sager's contribution is a response to this puzzling passage, for Sager sketches and defends an alternative one-system account of law that is fully moralized but demarcates the realm of legal value in terms of Dworkin's idea of structuring principles rather than judicial enforceability.

As Sager explains at length, Dworkin introduces the notion of structuring principles to accommodate the commonly held thought that there might be a gap between what is legally required and what would be best measured in terms of other values of political morality, such as justice. In a key illustrative example, Dworkin notes that families are loci of a kind of institutional morality, for past familial decisions, actions, and interactions conspire to generate reasons that compete with other moral considerations.[34] We have seen an application of this same idea in our discussion of Dworkin's conception of associative obligations. That is, the value of integrity requires members of a community to conform to the best interpretation of the extant network of putative obligations that constitute the community despite such obligations' significant (but not too egregious) moral

[33] Id. 413.
[34] Id.

failings. The key thrust, then, of Sager's response to Dworkin is that the key distinction between law and other categories of value is not that laws are properly enforceable by courts. Rather, as we understand Sager's view, the key distinction is that laws are normative requirements mediated by structuring principles, and, contra Dworkin, they might be so mediated irrespective of the propriety of their judicial enforcement.

David Dyzenhaus discusses at length Dworkin's difficulties characterizing the legal status of deeply unjust putative laws, such as The Fugitive Slave Act of 1850. Enacted by the U.S. Congress, this statute required any authority (including those within non-slave state jurisdictions) to return escaped slaves to their owners. Dworkin argues that, given this statute's profound injustice, the most plausible possibilities regarding its legal status are: (1) it is a law that no judge should enforce save perhaps in exceptional circumstances, or (2) it is not law at all. Dworkin opts for the first possibility.

Dworkin's discussion of the status of the Fugitive Slave Act reveals the full texture of his one-system view of law and morality. On this account, laws are norms that courts are duty-bound to enforce by dint of structuring principles such as integrity and fairness. On his view, the Fugitive Slave Act meets this description, and hence, it is law. However, he adds that other considerations, such as justice, might trump these values and, hence, the duty of enforcement that they ground.

By contrast, Dworkin opts for the second option when characterizing the legal status of Nazi law. This body of putative law, he argues, is not law at all given the pervasive wickedness of the Nazi regime. The thought seems to be that such pervasive wickedness does not merely defeat requirements grounded in structuring principles, such as fairness and integrity that characteristically ground the judicial enforceability of norms; rather, it fully undercuts such values. That is, because of the pervasive wickedness of the Nazi regime, enforcing its laws would neither be fair nor an act of integrity.

Dyzenhaus questions Dworkin's treatment of both the Fugitive Slave Act and Nazi law. With regard to the former, Dyzenhaus notes Dworkin's qualification that legitimacy is a matter of degree. As Dworkin puts it:

> a government is illegitimate in respect to a particular person it claims to govern if it does not recognize, even as an abstract requirement, the equal importance of his fate or his responsibility for his own life.[35]

Accordingly, argues Dyzenhaus, Dworkin must recognize that antebellum American law, a fortiori the Fugitive Slave Act, does not obligate slaves. Reminiscent of Delmas's core claim discussed above, Dyzenhaus also doubts that any law that blatantly denies equal concern and respect is a pro tanto obligation for anyone. More specifically, rather than defeating a requirement to enforce, the injustice of the Fugitive Slave Act undercuts the ground of that requirement. In other words, Dyzenhaus suggests that by dint of the Fugitive Slave Act's

[35] Dworkin (2010: 1059).

injustice, no structuring principle, such as fairness or integrity would be realized by enforcing it.

Although Dyzenhaus seems unmoved by the positivist intuition that any adequate theory of law must characterize the Fugitive Slave Act as legally valid, the same cannot be said for Dworkin. Moreover, this intuition is supported by a key aspect of Dworkin's legal theory—namely, the requirement that to be true, any proposition of law must fit and justify extant legal practice. As Dworkin states:

> The judge's decision—his postinterpretive conclusions—must be drawn from an interpretation that both fits and justifies what has gone on before . . .[36]

Given this view, one might worry that on any plausible characterization of the desideratum of fit, any judicial conclusion that the Fugitive Slave Act was not legally valid would be false, for it would not sufficiently fit the practice. Another way to put this same worry is that there might not have been sufficient resources within antebellum American law to justify an interpretation of that legal practice which casts the enactment and sustained enforcement of the Fugitive Slave Act as mistakes rather than datapoints that had to be accommodated. The latter half of Dyzenhaus's contribution seeks to dispel this worry.

Dyzenhaus's argument rests on the premise that Lon Fuller's inner morality of law is necessarily an element of any extant legal practice. Dyzenhaus notes that even the seminal contemporary positivist, H.L.A. Hart might accept this premise, for Hart at times seems to suggest that a necessary existence condition of any legal system is that its constitutive norms satisfy to a significant degree the eight desiderata that constitute the Fuller's inner morality of law: generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time, and congruence between official action and declared rule.[37]

With this premise in mind, Dyzenhaus puts what we take to be a key claim of his contributions as follows:

> Dworkin and legal positivists overlook the possibility that if law has to comply with such criteria to a significant degree, it will in fact be the case that an interpretive model of the kind Dworkin advocates will have significant traction in the positive law of any particular legal order.(156)

To clarify this point in terms of the recurrent example, a judgment that the Fugitive Slave Act was not legally valid might well meet Dworkin's dimension of fit, for among the materials that any legal judgment must fit are Fuller's eight formal features of any legal system. Conversely, a strike against characterizing the Fugitive Slave Act as legally valid is that it does not fit well with any legal practice, such as the American antebellum system, that embodies Fuller's eight

---

[36] Dworkin (1986: 239).

[37] See e.g., Hart (1994: 193-200). See also Fuller (1969).

criteria to a significant degree, thereby acknowledging the dignity of the legal subject.

To put the gist of Luis Duarte d'Almeida's contribution in terms of Dworkin's distinction between one-system and two-system legal theories, Duarte d'Almeida contests the assumption held by Dworkin and the majority of legal theorists that H.L.A. Hart was a seminal proponent of a positivistic two-system view, according to which the legally valid norms of any legal system are fundamentally determined by social facts. On the contrary, argues Duarte d'Almeida, Hart had very little to say one way or the other regarding this issue.

Key to Duarte d'Almeida's argument is Hart's distinction between external statements about law and internal legal statements. Key to this distinction is Hart's idea of the rule of recognition. According to this idea, for any legal system, the system's officials converge in the acceptance of certain public standards of validity, and accordingly, they apply this shared standard when identifying the laws of their system.[38] As Hart put it, an internal statement "manifests the internal point of view and is naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid."[39] As Hart notes, the simplest kind of internal statement takes the following form: It is the law that . . . (e.g., Oxford University is empowered to amend certain statutes that affect any of its colleges).[40] By contrast, an external statement "is the natural language of an external observer of the system who, without himself accepting its rule of recognition, states the fact that others accept it."[41] For example, an external observer might note that in England, they recognize the enactments of the Queen in Parliament (e.g., the Universities of Oxford and Cambridge Act of 1923) as law.

The key thrust of Duarte d'Almeida's contribution is to contest a commonly held assumption about Hart's theory that informs Dworkin's criticisms of Hart. According to this assumption, Hart offered an analysis of internal statements according to which the legally valid norms of any legal system are those and only those identified as such by the system's rule of recognition, i.e., the standard of legal validity accepted in common by the system's officials. Duarte d'Almeida argues that this was not one of Hart's aims. In his words:

> Hart's core aim, in other words, is to offer an analysis of external statements of the form "there exists a legal system in community *c*." As is well-known, he characterises the relevant social phenomenon as involving "two aspects": general obedience by the bulk of the population to those laws that are valid by the system's tests of validity, and (at least in normal cases) a "unified or shared official acceptance of the rule of recognition containing the system's criteria of validity." As should now be obvious, this analysis

[38] Hart (1994: 94, 100 and 116).
[39] Id. 102.
[40] Universities of Oxford and Cambridge Act 1923, section 7(3).
[41] Hart (1994: 102-103).

> does not (and is not meant to) give us an analysis of either particular internal statements of legal validity, or internal statements of (or applying) first-order legally valid rules.(185)

In addition to offering a compelling and contrarian exegesis of Hart's legal theory, a further key virtue of Duarte d'Almeida's contribution is twofold. First, it highlights and cogently explicates the underappreciated distinction between "two perspectives (and two corresponding kinds of theories): the external and the internal perspectives of law." Second, it warns against hastily conflating these two kinds of theories. That is, it warns against hastily inferring that if, as a matter of social fact, certain criteria of validity are convergently accepted by the officials of any legal systems, then, from the internal perspective of the officials of any such system, the system's legally valid norms are those and only those that would be identified as such by the convergently accepted criteria. Moreover, in light of the distinctions that Duarte d'Almeida's piece brings to the fore, Dworkin's theory can be readily characterized as focused on a theory of the internal perspective of law, whereas, as Duarte d'Almeida illustrates, Hart's legal theory was at least in part a theory of law's external perspective.

As a lengthy coda to his main argument, Duarte d'Almeida critically assesses the legal theory advanced by Stefan Sciaraffa, one of the editors of the present volume.[42] Duarte d'Almeida worries that Sciaraffa's argument is emblematic of contemporary legal theorists' all too common failure to pay sufficient attention to the important distinction between internal and external legal theories.

In his own behalf, Sciaraffa would argue that rather than posing a challenge to the justificatory view, the very distinction that Duarte d'Almeida carefully articulates and presses is at the foundations of this legal theory. More pointedly, from Sciaraffa's perspective, one of the virtues of Duarte d'Almeida's piece is that its careful articulation of the distinction between the internal and external perspectives of law facilitates a more forceful statement of the justificatory view. That is, put in Duarte d'Almeida's terms, key to the justificatory view is the distinction between Hart's theory of a legal system, a theory of law advanced from the external perspective, from Hart's theory of legal content, an analysis of legal validity as understood from the internal perspective of legal officials.

Whereas Duarte d'Almeida argues that Hart is careful not to conflate the internal and external perspectives of law, Sciaraffa assumes that Hart is no less guilty on this score than many of his followers and critics. Moreover, he argues that any satisfactory theory of legal content (in Duarte d'Almeida's terms, any theory about law's internal perspective) must rest on Hart's theory of law's external perspective. [43] However, Sciaraffa's justificatory view rejects Hart's positivist

---

[42] See Sciaraffa (2012).

[43] The key reason why is that inquiry into the internal perspective of any legal system presupposes that that there is such a system, yet there can be no such system unless there is a body of officials who sufficiently converge with respect to the criteria of validity they accept. Cf. Hart (1994: 122-123).

theory of internal statements partly on the grounds that this aspect of Hart's legal theory is a result of the just described conflation between the internal and external perspectives. In place of this positivist internal theory, the justificatory theory adopts a thoroughgoingly non-positivist one-system theory of law.

To help see the internal aspect of the justificatory view, consider the unoriginal example of a statute enacted by a democratic assembly that places restrictions on the powers of future democratic assemblies. Put in terms of this example, the justificatory view holds that the validity of such an entrenching statute would turn on the particular requirements of the objective political values that justify legal officials in their practice of by and large recognizing the democratic assembly's enactments as law. In sum, the justificatory view holds that the legally valid norms of any legal system are those and only those identified as such by the commonly accepted criteria as modified and extended in accordance with the considerations of political morality that support them.

Ken Himma argues in his contribution that there is an important respect in which Hart's and Dworkin's legal theories are inconsistent, and he sides with Hart with respect to the contested issue. For Himma, the key contrast is that, whereas Dworkin's theory supplies an immodest conceptual analysis (ICA) of the folk concepts relevant to legal practice, Hart's theory offers only a modest conceptual analysis of those concepts.

Himma borrows the distinction between immodest and modest conceptual analysis from Frank Jackson. On Jackson's account, modest conceptual analysis (MCA) seeks to map and rationalize to some degree the folk understanding of a concept, say, law, morality, or belief, as a necessary prelude to determining whether those concepts refer to objects that can be located in the world. Moreover, he holds that this form of MCA is a prelude to determining whether the object of the analyzed concept is entailed by the world's metaphysically basic objects. That is, MCA is a modest first step in what Jackson colorfully describes as serious metaphysics: determining which of our folk concepts we should eliminate by dint of their non-entailment by the world's metaphysically basic features.[44]

By contrast, ICA holds that we can learn and argue about the fundamental nature of the world on the basis of our folk concepts. To borrow one of Jackson's examples, an immodest conceptual analyst might reject the thesis that the world is composed of temporal parts on the grounds that it is inconsistent with our intuition that different things (in this case, different temporal parts) having different properties is not tantamount to change.[45] To help see the contrast between these two modes of conceptual analysis, consider that the modest conceptual analyst who accepted the theory about temporal parts would take the folk concept's inconsistency with it to be a reason to eliminate the folk concept of change.

A key premise of Himma's argument is that MCA as applied to law cannot result in an error theory about law. That is, it cannot result in theory that implies

---

[44] See Jackson (1998: chs. 1-2).

[45] Id. 42-43.

that the folk's beliefs about law are systematically mistaken. One might object to this premise on the ground that one of Jackson's key motivations for engaging in MCA with respect to any folk concept is that it might very well lead to the conclusion that despite its widespread use, the concept has no referent in the world as it is and for that reason should be eliminated from our serious discourse. In other words, one of Jackson's key motivations for engaging in MCA with respect to any folk concept is that it might lead to an error theory.

Though correct as far as it goes, the foregoing objection misses Himma's point, for Himma untethers the methodology of MCA as applied to the folk concept of law from Jackson's larger project of serious metaphysics. Rather, Himma reworks Jackson's distinction in terms of the respective goals of inquiry that he assigns to them. On this account, the goal of MCA is "to understand certain features of the world as they are defined and articulated through our conceptual practices."(207) For Himma, the goal of MCA in the context of jurisprudence is solely to map the conceptual practices that are relevant to legal practice. By contrast, the goal of ICA is "to understand those features as they *actually are* independent of the practices that enable us to describe them."(207) In other words, the goal of ICA as applied to jurisprudence is to ascertain truths about some underlying nature of legal practice that is distinct from our concepts that are relevant to the practice.

The point, then, of Himma's key premise is that the folk cannot be systematically mistaken about the jurisprudential MCA theorist's object of inquiry because that object, the folk concepts relevant to legal practice, is constituted by the folk's beliefs and understanding. As Himma puts it:

> Insofar as our ordinary talk defines the nature of a thing, our conceptual theory of the thing must, at the end of the day, harmonize with ordinary talk; failure to do so is a potentially fatal error for a conceptual theory under MCA.(208)

By contrast, on Himma's view, because the ICA theorist's goal is to ascertain some underlying nature of legal practice that is independent of the relevant folk legal concepts, the ICA theorist must allow that the folk could be systematically mistaken about that nature.

A second key premise of Himma's argument is that Dworkin's theory of law is an error theory, for it comprises a number of theses about law that most legal practitioners would reject. Himma attributes a number of such theses to Dworkin, including the claims that there is almost always a right legal answer even in putatively hard cases, that judges lack a quasi-lawmaking authority and that law includes moral principles that cohere with extant legal practice.

Given that Dworkin is committed to such an error theory, Himma argues that Dworkin faces the following dilemma. Either he is engaged in MCA or ICA. If he accepts MCA, then he must abandon many of the defining theses of his theory, for they amount to an error theory that baldly fails to achieve the goal of MCA—namely, faithfully mapping the folk concepts relevant to law. Alternatively, if Dworkin is engaged in ICA, then he has not given us any reason to think that his

jurisprudential conclusions track law's underlying nature better than the folk's beliefs and understandings do. As Himma puts the point:

> The problem is that, for the justification of the imputation of an error theory to some view to succeed, the premises in that justification must be more intuitively plausible than the folk views that the theory seeks to refute. As far as I can see, there is nothing in Dworkin's argument above that jumps out as more plausible . . . .(221)

Read as a perspectival constructivist of the sort described in the first section of this introduction, perhaps Dworkin could respond to this dilemma by embracing its first horn. That is, he could hold that he is engaged in MCA with respect to the interpretive concept of law. On this view, consistent with Himma's version of MCA, the object of inquiry is not law's nature, robustly independent of our beliefs and understandings about the law, for from the constructivist's perspective there is no such robustly mind independent object in the realm of value (which encompasses the law). Nonetheless, the folk might be systematically mistaken about the identity of their system's legally valid norms so long as they have not engaged sufficiently in interpretive reasoning about the law and its requirements. Note that by raising the possibility of this response, we do not purport to adjudicate this issue so much as to identify a potentially important point of contact between Dworkin's legal theory and Himma's criticisms.

Michael Giudice marshals an extended defence of a methodologically pluralistic approach to jurisprudence that stands in contrast to what he characterizes as Dworkin's methodological imperialism. The pluralism Giudice defends comprises three methods: morally or politically evaluative investigation; social-scientific inquiry into the economic, social, and historical influences on the broad array of agents and actions that constitute different aspects of legal practice; and analysis of the concepts that animate the actions and attitudes that constitute this practice. By contrast, Giudice imputes a methodologically imperialistic approach to Dworkin according to which all theories of law must not only be theories of moral evaluation that attribute a fundamental point or purpose to law; they must also be offered from and for the perspective of the judges who participate in legal practice.

A key premise in Giudice's argument is that "each of the three general families of methods" that he defends "is correct and appropriate, and precisely because each responds to different aspects or dimensions of the nature of law itself."(226) As Giudice characterizes this nature: "(i) law is morally (and politically) significant, in that decisions to create, apply, and enforce law affect people's interests and well-being in numerous ways; (ii) law's operation depends at crucial junctures on the decisions and dispositions of humans and human institutions, which are, like all humans and human institutions, products of and influenced by social, economic, psychological, and historical forces of various kinds; and (iii) legal concepts are the creation of shared ideas, notions, and categories, which exist in

the form of sets of inter-subjective understandings."(239) In sum, Giudice defends his tripartite pluralistic methodology on the grounds that it is the appropriate approach for inquiry into law given its correspondingly tripartite nature.

Giudice is careful to state that he does not reject Dworkin's methodological approach entirely, for he holds that any fully adequate understanding of law would make use of Dworkinian methodology with respect to those aspects of legal phenomena for which it is appropriate. Rather, he criticizes Dworkin's theory for its methodologically imperialistic claims, and hence its failure to recognize that this methodology is appropriate for inquiry with respect to only one aspect of law—presumably "the part constituted by its moral significance" as described in the following passage.

> Law of course exists at particular moments in time, but it is also part of its nature that it persists through time. It is in turn not outrageous to suppose that to explain law's persistence through time might require different methods, particularly those offered by social scientific theories. From here it is also not hard to see that once we place law back into its temporal context, whereby actual participants (such as judges) have to carry on with their activities in ways responsive to the nature of law, we will also need, again, *because of the very nature of law* (the part constituted by its moral significance), morally and politically evaluative theories of law.(240)

Without pretending to adjudicate Giudice's criticisms of Dworkin's methodological approach, we think it is useful to identify what might be a key point of disagreement between Dworkin and Giudice. Put in terms of Duarte d'Almeida's contribution, the focal concern of Dworkin's theory is the law's internal perspective. There is nothing in this theory that is inconsistent with Giudice's claim that a key aspect of law's nature is the part that is of moral significance; however, from the perspective of Dworkin's theory this aspect of law is not merely of moral significance. Rather, this aspect of law is itself a value—an interpretive value concept that is subject to the unity of value thesis.[46] Accordingly, determining the truth of claims about this value (i.e., claims about its requirements or, in other words, internal legal statements) turns on whether a constitutive case can be made for those statements on the basis of yet other value-claims, particularly (as the discussion above suggests) those relating to justice and the structuring principles of fairness and integrity.

The final contribution to the volume's third section is Chris Essert's piece in which he defends what he refers to as the Simple View of law. Because we think we will be in a better position to situate Essert's arguments with respect to Dworkin's theory after discussing the final section's contributions, we have placed our discussion of Essert's piece in the concluding section of this introduction.

---

[46] See Dworkin (2011: ch. 19).

VALUE IN LAW

The compendium's final section comprises pieces that some would describe as works in normative jurisprudence as opposed to general or analytic jurisprudence. According to this typology, works of the latter sort raise questions about the meaning and referent of claims about law as well as the basis for adjudicating them. So construed, general jurisprudence raises semantic, metaphysical, and epistemic questions about law that are analogous to those posed by metaethicists with respect to morality. By contrast, according to this same typology, normative jurisprudence addresses discrete bodies of law, particularly their structure and the key underlying values that define and animate those areas.

A Dworkinian-minded scholar might resist the foregoing typology on the grounds that the truth conditions of any proposition of law are determined by the requirements of the relevant values, and, hence, metalegal arguments about those truth-conditions must rest on first-order value-claims. Despite this objection, the common distinction is robust. So long as we are careful to acknowledge that on some metalegal views such as Dworkin's, the truth-conditions of legal statements turn on first-order questions of value, it is useful and illuminating to distinguish works that focus on the metaethics of law in general, as it were, from those that focus on the structure and underlying values of discrete bodies of law.

With Hamish Stewart's contribution, we return to a discussion of Dworkin's master value of dignity and the associated values of equal concern and respect. Stewart argues that Dworkin has overlooked an important role that these values play with respect to procedural law, particularly the aspect of procedural law that governs and constitutes courts' fact-finding procedures. Stewart asserts that "the purpose of fact-finding in litigation is not to find facts for their own sake but to use the facts found to grant or deny a legal claim."(376) Accordingly, Stewart holds that accuracy in fact finding is not the only underlying point of procedural law, for there are values other than accuracy in fact finding that should be served by the laws that constitute and regulate courts' fact-finding proceedings. Stewart applauds Dworkin for his recognition of this point and his attempt to provide a more complete account of these underlying values. As Stewart reads him, Dworkin conceives of "procedural entitlements as a way of fixing the level of accuracy in fact-determination, and therefore of distributing the risk of moral harm, in a way that is fair to all potential litigants."(387) Thus, Dworkin holds that in addition to accuracy, fairness to all potential litigants is an animating value of procedural law.

Although Stewart considers Dworkin's account to be a step in the right direction, he argues that procedural law must directly serve the requirements of equal concern and respect. As Stewart puts it, procedural laws should reflect "the more basic demands that the fact of each litigant's personhood places on the process."(387) In support of this claim, Stewart asks the reader to consider the burden of proof that in most any liberal society must be meet in order to convict a defendant of criminal wrongdoing.

Stewart speculates that it very well might be that rules specifying a less demanding burden of proof would serve the values of accuracy and fairness as well or perhaps even better than the beyond-a-reasonable-doubt standard. Thus, for Stewart, the problem with the less demanding standard is not that it is not fair, for it would be so long as all criminal defendants were held to it. Moreover, the problem is not that it would lead to less accuracy in fact finding, for that is a difficult empirical question. Rather, Stewart argues, the key problem is that by subjecting anyone to the harsh dealing of the criminal law on the basis of findings that are not beyond a reasonable doubt, we would thereby fail to accord the respect that her dignity as a person demands. In sum, on the basis of this observation and others along similar lines, Stewart argues that we must include a Kantian principle of respect for personhood in our account of the set of values that animates procedural law.

In their respective pieces, David Brink and Larry Alexander argue that Dworkin defended an originalist theory of constitutional interpretation. Roughly put, theories of constitutional interpretation specify the method of interpretation that judges must employ when interpreting the meaning of constitutional provisions pertinent to their adjudication of the constitutionality of legislative enactments as well as other governmental actions.

As Connie Rosati usefully puts it in her contribution, it is important to distinguish two aspects of any originalist theory.[47] The first specifies the content of the original meaning of constitutional provisions, whereas the second explains the legal effect of such original meanings. Implicit in Rosati's discussion is the plausible thought that to be originalist, a theory of constitutional interpretation must claim not only that constitutional provisions bear a meaning that is recognizably an original meaning but also that this original meaning plays a non-trivial role in determining such provisions' legal effect.

Brink's and Alexander's conclusions are provocative, for Dworkin is typically cast as a leading critic of originalism as well as an exponent of a non-originalist theory. As I shall explain, whereas Brink defends a sympathetic reworking of Dworkin's view (an originalism of principle as he describes it), Alexander explains why, in his view, Dworkin is committed to a highly unappealing form of originalism.

Key to Brink's argument is the distinction between description and referential theories of meaning. On Brink's account, description theories hold that a term's meaning is fixed by an associated nominal definition—roughly, a definition or description conventionally accepted by the competent users of the term. For instance, a description theorist might hold that the term *bachelor* means an unmarried male by dint of the fact that the term's competent users accept and apply this definition when using the term. Accordingly, on this account, the extension of bachelor includes all and only those objects that meet this conventionally

[47] See Rosati n. 32 (chapter 14, "The Moral Reading of Constitutions," herein) for a useful typology of forms of originalism and what she takes the key originalist tenet to be.

accepted nominal definition. By contrast, referential theories hold that a term's meaning is fixed by its underlying real definition. For example, a direct reference theorist might hold that the real definition of water is H_2O and, hence the extension of this term includes all and only instances of H_2O.

A key point that Brink cites in support of referentialist versus description theories is that the latter seems implausibly committed to the denial of the intuitively appealing claim that there "can be a fact of the matter about the extension of a term even when there is disagreement about its criteria for application or its extension."(277) The latter, on the other hand, can accommodate this claim. As Brink puts it:

> [W]e don't conclude that the meaning or extension of the word "toxin" is indeterminate just because people disagree about what the criteria for toxicity are or what substances are toxic, and we don't conclude that sense or reference of "justice" is indeterminate because of disagreements between libertarians and egalitarians about the nature of justice.(278)

In sum, for Brink a key point in favor of referentialist theories is that they do not join description theories in this implausible conclusion, for on the referentialist account, meaning is fixed by a real rather than a nominal, and hence conventionally accepted, definition. As an important aside, note that Brink borrows these disagreement-based arguments against description theories from the philosophy of language and that these arguments parallel Dworkin's disagreement-based criticisms of H.L.A. Hart's theory of law.[48]

Brink further distinguishes between a textualist form of originalism "that appeals to the meaning of the words in which the legal provision is expressed and an intentionalist form that appeals to the intentions or purposes of the framers of the provision."(281–82) Brink's textualist originalists divide into two further camps. The first specifies the original meaning of constitutional provisions in terms of their shared public meaning, whereas the second specifies this meaning in terms of the framer's intent (specific according to one version of this view and abstract according to a second). Brink further distinguishes between referentialist and description public meaning textualists. The description public meaning textualist holds that the original meaning of constitutional provisions is fixed by the publicly settled nominal definitions of such provisions' key terms, whereas the referentialist public meaning textualists holds that such meanings are fixed by real definitions.

Brink argues that with respect to those constitutional provisions containing abstract and contentious moral terms, such as equal protection, and cruel and unusual punishment, referentialistic public meaning originalism is much more plausible than descriptive public meaning originalism, for there seems to be no

[48] See Brink (this volume), n. 6 for cites to the relevant works from the philosophy of language. See also Dworkin (1986: ch.1) for Dworkin's seminal statement of his disagreement-based criticism of Hart.

settled nominal definition of these terms, yet with very few exceptions those who debate the applicability of such terms to particular cases act as if they mean the same thing by them. Brink argues that Dworkin's theory of constitutional interpretation is a variation of this more plausible referentialistic form of originalism, according to which the meaning of key abstract constitutional terms is fixed by an associated real definition whose content is established by way of interpretive reasoning.

Raz's discussion of Dworkin's unity of value thesis suggests an alternative to Brink's characterization of the semantic theory that informs Dworkin's theory of constitutional interpretation. As discussed above, Raz distinguishes two possible readings of Dworkin's unity of value thesis: the ODT and the perspectival constructivist reading. According to this first claim, true value-claims are robustly mind-independent. Hence, interpretive reasoning provides epistemic access to these truths but it does not constitute them. By contrast, on the second perspectival constructivist reading of Dworkin's unity of value thesis, all truths about value are constituted by the deliverances of interpretive reasoning as applied to the beliefs about value that comprise the relevant perspective.

Brink's referentialistic reading of Dworkin's semantic view complements[49] Raz's ODT, for referentialistic accounts posit real definitions that fix the extension of the relevant terms, in which such real definitions are robustly mind-independent properties by virtue of which the term properly applies.[50] To wit, in Brink's key illustrative example, H_2O is the real definition of water. By contrast, no robustly mind-independent properties figure in the perspectival constructivist account, and hence, strictly speaking, if Dworkin is a perspectival constructivist, then there would be no place in his view for a referentialistic semantic theory. That said, there is a place for some other non-descriptional semantic theory that does not rely on real definitions to explain the sense in which a concept or meaning of a term is shared despite disagreement about its nominal definition. Notably, in the last decade or so, a number of theories (heretofore quasi-referential theories) along these lines have been proposed.[51]

Alexander's contribution seconds Brink's provocative conclusion that Dworkin is an originalist. Key to Alexander's argument is the notion of fit that figures prominently in Dworkin's idea of constructive interpretation. For Dworkin, the constructive interpretation of any object is constrained by dimensions of fit and justification. As he puts it:

> Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. It does not follow, even from that rough account, that an interpreter can make of a practice or work of

[49] We do not mean to imply that only this semantic theory could serve as a complement to Raz's ODT.

[50] See Boyd (1989) and Brink (1988).

[51] See Sayre-McCord (1997), Van Roojen (2006), and Schroeter and Schroeter (2009).

> art anything he would have wanted it to be . . . . For the history or shape of a practice or object constrains the available interpretations of it . . . .[52]

Thus for Dworkin, the correct interpretation of any object or practice must fit the pretheoretical materials that constitute the object or practice to a requisite degree, and it must be justified in the sense that it casts the practice or object as the best possible instance of its genre.

Alexander observes that this account of constructive interpretation commits Dworkin to the existence of a fixed set of pretheoretical materials with which any correct interpretation must fit. Alexander's main claim is that authorial intent is a key element of this fixed set of pretheoretical materials that constrains constitutional interpretation. As Alexander states:

> In order to make the law the best it can be, there has to be a "there" there, something the law is that can be made better. Or, put differently, for the dimension of fit to do any work, there has to be something with which to fit. As Dworkin realizes, at least post-*Law's Empire*, the mere marks of legal texts, when divorced from the intended meanings of the texts' authors, can mean anything. So legal texts must be given their author-intended meanings.(319)

On this basis, Alexander argues that Dworkin must espouse a version of originalism according to which authorial intent informs the meaning of constitutional provisions and constrains judicial constitutional interpretation.

As noted above, Dworkin accepts that a fixed set of preinterpretive materials constrains any act of constructive interpretation. Moreover, he repeatedly states that political decisions as embodied in constitutional provisions belong to the fixed set of pretheoretical materials that constrain legal and, hence, constitutional interpretation. However, Dworkin would likely disagree with Alexander's contention that the authorial intent behind these provisions belong to this fixed set of materials. To help see why, consider Dworkin's comments about the role that speaker intent plays in the context of conversational interpretation.

> Conversational interpretation is dominated by speakers' intentions because the point of interpreting in conversation is almost always the communication of such intentions. Legal interpretation is not dominated by the actual mental states of legislators and other officials because the best understanding of the purpose of interpreting statutes and other legal data makes irrelevant most of what those officials actually think or intend.[53]

In this passage, Dworkin characterizes conversational interpretation as a kind of constructive interpretation. That is, he ascribes the point of communicating

---

[52] Dworkin (1986: 52).

[53] Dworkin (2011: 149-150).

intentions to conversational practice, and given this point, any good interpretation of conversational utterance must adequately fit the speaker's intention. By contrast, as the immediately foregoing passage attests, Dworkin holds that the underlying point of the practice of legal interpretation (which presumably encompasses constitutional interpretation) renders speaker intent irrelevant.

The question that Alexander might press at this point is that if the intent underlying constitutional provisions does not constrain constitutional practice, then what possibly could? The general answer suggested in the immediately foregoing passage is those elements of the pretheoretical passage deemed relevant and hence constraining by the best interpretation of the practice. As applied to the context of constitutional interpretation, these elements might deem authorial intent as irrelevant while at the same time casting some other meaning associated with such provisions (e.g., their referential or, alternatively, quasi-referential meaning) in this constraining role. Note that in at least one passage, Brink seems to employ this approach, for there he points to underlying democratic values of legal practice to support his public-meaning-referentialist account of the meaning of constitutional provisions. To wit:

> There is little to recommend appeal to a speaker-relative, rather than a public, conception of meaning. In fact, as Scalia recognizes, democratic principles argue against both [speakers'-specific-intent and framer's-specific-intent forms of originalism] inasmuch as it is the public meaning and concepts expressed by provisions that are democratically adopted.(287)

In her contribution, Aditi Bagchi amplifies upon the just-described Dworkinian approach to interpretation and employs it to develop a theory of contractual interpretation. As she puts it:

> My aim is not to study [Dworkin's] claim about the nature of political authority but only its relationship to the mode of interpretation he recommends, i.e., reading legal rules in light of normative commitments exogenous to the immediate legal source for the rules. Dworkin inverts the presumptive conceptual chronology by asking how interpretation might serve authority—not yet secured—instead of assuming that we interpret only those texts that are backed by authority.(354)

Bagchi's key observation in this passage is that for Dworkin, content should be ascribed to authoritative utterances in light of the underlying value served by being authoritatively guided by those utterances. To cite an apposite example from Brink's contribution:

> For instance, in identifying the abstract intent of the framers of the equal protection clause of the Fourteenth Amendment with an equality or anti-discrimination constraint on governmental action, we are identifying a value that explains the political purpose that the Fourteenth Amendment was supposed to serve and, hence, rationalizes its adoption. The authority of this moralized reading of fidelity to the intentions of the framers derives

> from the fact that our political system is a form of constitutional democracy in which there are substantive moral and political constraints on the behavior of democratic bodies.(285)

Thus, Brink argues for specifying the meaning of the Fourteenth Amendment in terms of the abstract intent of the framers because, so construed, the Fourteenth Amendment is authoritative by dint of the values underlying the practice of constitutional democracy, whereas if construed in terms of the Framers' specific intent, it is not authoritative.

Along these same lines, Bagchi argues that we should interpret contractual provisions by way of what she refers to as normative triangulation.

> Where authority is content-dependent, the intention of an author is to that extent displaced. That displacement does not disrespect the author's authority; it preserves it. For where the authority of the author depends on how it is exercised, interpreting a text in a way that is faithful to intention but inconsistent with background constraints actually undermines the author's authority, if not in a single case, then over time.(370)

Bagchi's key claim is that the intent of contracting parties is only one, albeit an important determinant, of an adequate contractual interpretation. In addition, background normative constraints are also relevant. Moreover, Bagchi is keen to emphasize that although these background normative considerations are exogenous to the contracting parties' intent they nonetheless are key determinants of the content of their contractual obligations.

In a key passage from her contribution, Connie Rosati states:

> On one view about the legitimacy of constitutions, a view that I find appealing, a constitution is legitimate when its content and the processes of law-making that it specifies are such as to give rise to laws that one has pro tanto moral obligation to obey; and in order for those law-making processes to give rise to laws that one has pro tanto moral obligation to obey, the laws to which it gives rise must tend, as a consequence of its content and law-making processes, to comport with morality, at least over time.(338)

Rosati offers the principle of reading constitutions morally as a corollary to the view of constitutional legitimacy that she finds appealing. That is, she argues that judges should interpret constitutions in ways that contribute to their legitimacy, as legitimacy is defined in the cited passage. Thus, Rosati embraces the core idea that motivates Dworkin's approach to legal interpretation discussed above. Put it Bagchi's terms, she joins Dworkin in inverting "the presumptive conceptual chronology by asking how interpretation might serve authority—not yet secured—instead of assuming that we interpret only those texts that are backed by authority."(354)

Although Rosati embraces Dworkin's concept of interpretation, she rejects his conception of the moral reading, for she doubts that interpreting constitutional provisions in the manner that Dworkin proposes (discussed extensively

above) would result in the articulation and enforcement of laws that, over time, would better comport with morality. She offers two lines of argument for this doubt. First, she argues that the interpretive method Dworkin proposes calls on judges to exercise skills for which they have no special training. Second, she fears that the deliverances of Dworkinian interpretive reasoning are likely to be highly indeterminate, thereby leading judges to fill in the gaps with their own particular policy preferences. These criticisms inform her alternative conception of the moral reading, for she aspires to articulate an alternative conception of reading a constitution morally that does not suffer from these defects. In sum, in addition to offering a cogent and carefully defended alternative to Dworkin's moralized conception of constitutional interpretation, Rosati's piece illustrates that a theorist might accept Dworkin's general approach to constitutional interpretation or, for that matter, the constructive interpretation of any number of practices or value-concepts, without accepting his particular conception or interpretation of the object.

Conclusion

We would like to conclude this introduction to our volume with a discussion of Chris Essert's piece, a contribution to the third part of our volume that, as such, responds to Dworkin's general jurisprudence. We have saved this discussion for last not only because, as noted above, doings so better positions us to situate Essert's piece in relation to Dworkin's theory. In addition, we think this discussion serves as a fitting conclusion to our introduction, for we hope here to identify a number of key threads that unify Dworkin's work and the pieces in this volume.

Essert defends what he refers to as the Simple View of law. Essert models the simple view on Niko Kolodny's analysis of the relationship between what we might loosely described as *the ought of rationality* on the one hand and *the ought of reasons on the other*.[54] To see the two relata that Kolodny has in mind, consider that a moral agent might wrongly judge that he has reason to perform some action or course of action—say to drink a quantity of petrol that he mistakes for water or to work long hours in a misguided pursuit of esteem and wealth at all costs. A common thing to say about such an agent is that in one sense he ought not to act in accordance with his mistaken judgment, for whether he knows it or not, the reasons that apply to him require him not to do so. However, a no less common thing to say is that, in another sense, he ought to act in accordance with his mistaken judgments, for it would be irrational not to. Kolodny seeks to explain the relationship between these two seemingly distinct categories of ought—the ought of reason and the ought of rationality.

[54] Kolodny (2005).

Kolodny argues for a monistic account of this relationship. According to his view, there is only one category of ought—the ought of reason. Roughly put, he holds that the seemingly distinct ought of rationality is the ought of reason from a point of view—in the examples above, a mistaken point of view. Thus, on his account, to say that the agents described in the example above ought to drink the petrol or work until 10 p.m. every night is to say that from their point of view, they have overall reason to do so.

Essert's key intuition is that the seeming ought-dualism that Kolodny's account unifies parallels a seeming plurality that bedevils philosophers of law—namely, legal and moral obligation. Moreover, Essert argues that this seeming plurality is fundamentally unified in much the same way that Koldony's oughts of rationality and reason are. Namely, on Essert's account, legal obligations are just what agents have the most reason to do from the legal point of view. Thus, for Essert, there is only one kind of normativity—the normativity of practical reason. However, there are many points of view of what such practical reasons require and the legal point of view is one of them.

Although Essert's simple view is monistic in one way, viewed from another perspective it is dualistic. That is, contra Dworkin, the Simple View constitutes a two-system view of law. That is, fundamentally, legal obligation is not continuous with the reasons, moral or otherwise of those to whom they apply. Rather, legal obligations are what those reasons require from the legal point of view—a view that may or may not be mistaken. Hence, Essert holds that there are two systems—the reasons there are, on the one hand, and the legal point of view of the reasons there are, on the other.

Essert ably defends this two-system view, and we have no intent of criticizing it or its supporting argument here. However, we do think it is a useful and a fitting conclusion to our introduction to identify what we take to be two key points of contention between this two-system Simple View and Dworkin's one-system approach.

To see the first point of contention, it helps to consider that whereas Kolodny seems to have in mind a point of view that is constituted by the beliefs and value judgments of a natural person, Essert's legal point of view presumably is constituted in some other way. Essert acknowledges this point, for he holds that "[t]he secondary rules, and in particular the Rule of Recognition, could be understood as picking out the ways in which the legal point of view is formed and so the ways in which legal obligations are determined."(266) In other words, on Essert's account, the legal point of view of any legal system is constituted by norms picked out by the criteria of validity that the officials of that system accept in common.

It is our view that Dworkin is committed to the existence of a legal point of view. More generally, as we have seen, it seems to us that he is committed to the point of view of a wide variety of practices. However, he would reject Essert's account of the legal point of view in favor of his account, according to which the legal point of view, like the point of view of many practices, is constituted by a constructive interpretation of the relevant practice—in this case, legal practice.

As Dworkin puts it, and as we have discussed above, constructive interpretations proceeds via a personification of the community that engages in the relevant practice. Accordingly, Dworkin would hold that, as such an interpretive construction, the legal point of view is partly determined by the best interpretation of the values that animate the relevant practice—in this case, legal practice.

So, for example, in keeping with this account of the construction of the legal point of view, one might embrace Brink's view that the content of constitutional provisions must be specified in accordance with a public meaning referentialist originalism, for attributing this content to this aspect of legal practice would answer to the democratic principles that justify it. Or, we might accept Bagchi's claim that the content we should attribute to the provisions of contracts is a function of the contracting parties' intent delimited by certain constraints of reasonableness, for such an interpretation would best reflect the values that animate the legal enforcement of contracts. In sum, Dworkin would argue that the legal point of view is not a view about the reasons we have; rather, it is a construction of such reasons, and hence, contra the two-system Simple View, the legal point is continuous with rather than distinct from those reasons.

If we read Dworkin as a kind of perspectival constructivist, there is yet a deeper point of contention between Essert's Simple View and Dworkin's theory. Namely, according to this reading of Dworkin, all reasons are constructions of some point of view or other. In other words, per the perspectival constructivist reading of the unity of value thesis, all true value statements (which includes all claims about what reasons there are) just are those that reflect the value judgments that would result from the application of Dworkinian interpretive reasoning to the initially unruly and wild set of value propositions comprised by the relevant perspective. To put this point in terms of Kolodny's dichotomy, read as a constructivist, Dworkin would reverse Kolodny's account of the relationship between the ought of reason and the ought of rationality, for so read, he would hold that the ought of reason is ultimately reducible to the ought of interpretive rationality.

References

Boyd, Richard (1988). "How to Be a Moral Realist." In *Essays on Moral Realism*. Geoffrey Sayre-McCord (ed.). Ithaca: Cornell University Press.

Brink, David (1989). *Moral Realism and the Foundations of Ethics.* Cambridge: Cambridge University Press.

Christiano, Thomas (2008). *The Constitution of Equality: Democratic Authority and Its Limits*. Oxford: Oxford University Press.

Dworkin, Ronald (2013). "A New Philosophy of International Law," *Philosophy and Public Affairs* 41, n. 1:2–30.

Dworkin, Ronald (2011) *Justice for Hedgehogs* Cambridge, MA: Harvard University Press.

Dworkin, Ronald (2010). "Response," *Boston University Law Review* 90:1075–1076.

Dworkin, Ronald (1996). "Objectivity and Truth: You'd Better Believe It," *Philosophy and Public Affairs* 25:87–139.

Dworkin, Ronald (1986). *Law's Empire*. Cambridge, MA: Harvard University Press.

Dworkin, Ronald (1973). "The Original Position," *The University of Chicago Law Review* 40:500–533.

Fuller, Lon (1969). *The Morality of Law*, revised ed. New Haven: Yale University Press.

Hart, H.L.A. (1994). *The Concept of Law*, 2nd ed. Oxford: Oxford University Press.

Jackson, Frank (1998). *From Metaphysics To Ethics: A Defense Of Conceptual Analysis*. Oxford: Oxford University Press.

Kolodny, Niko (2005). "Why Be Rational?" *Mind* 114:509–563.

Lynch, Michael (2009). *Truth as One and Many*. New York: Oxford University Press.

Price, Huw (2013). *Expressivism, Pragmatism, and Representationalism*. Cambridge: Cambridge University Press.

Raz, Joseph (2011). *From Normativity to Responsibility*. Oxford: Oxford University Press.

Sayre-McCord, Geoffrey (1997). "'Good' on Twin Earth," *Philosophical Issues* 8:267–292.

Schroeter, Laura and Schroeter, Francis (2009). "A Third Way in Metaethics," *Noûs* 43(1):1–30.

Sciaraffa, Stefan (2012). "Explaining Theoretical Disagreement and Massive Decisional Agreement: The Justificatory View," *Problema* 4:165–189.

Van Roojen, Mark (2006). "Knowing Enough to Disagree." In *Oxford Studies in Metaethics*, vol. 1, R. Shafer-Landau (ed.). New York: Oxford University Press.

Waldron, Jeremy (2006). "The Core of the Case against Judicial Review," *Yale Law Review* 115, n. 6:1346–1406.

PART I

The Unity of Value